Supreme Court, U.S.
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91-1979

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAN I. SCARBOROUGH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dan I. Scarborough, Pro Se
1045 Riverside Avenue
Jacksonville, FL 32204
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QUESTIONS PRESENTED

Does the Petitioner's Writ of Error Coram Nobis have time limitations since he fully served a two year sentence for conduct subsequently and indisputable settled by the United States Supreme Court to be outside the scope of the statute under which he was convicted and is he entitled to retroactive relief?

If an act alleged in Petitioner's indictment has been declared by the United States Supreme Court to be outside the cover of the statute and did not violate the law, must subsequent convictions based on the indictment also be reversed?

Since a non-constitutional change in the law has taken effect after Petitioner was convicted and served the full sentence is he entitled to retroactive application and consideration?

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IN THE SUPREME COURT

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DAN I. SCARBOROUGH,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dan I. Scarborough, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit for refusing to follow the mandate of the United States Supreme Court decision regarding McNally v. United States.

OPINIONS BELOW

The appeal to the United States Court of Appeals for the Eleventh Circuit was denied without opinion.

The order of dismissal by the District Court for the Middle District of Florida appears in Appendix B to this Petition. The ruling of the Magistrate, adopted by the District Court for the Middle District of Florida, appears in Appendix G.

JURISDICTION

The Court of Appeals denial of this matter was filed on September 16, 1991. A timely Petition for re-hearing En Banc was filed October 14, 1991. The Court of Appeals denial of the Petition for re-hearing was issued February 4, 1992 and is set forth in Appendix H. This Court's jurisdiction is invoked under Title 28, U.S.C. 1651 (a).

STATEMENT OF THE CASE

The United States District Court, Middle District of Florida, had jurisdiction pursuant to Title 18, U.S.C. Section 1341.

On July 30, 1981 an indictment was returned against Petitioner in the Middle District of Florida, charging him with mail fraud conspiracy, conspiracy to obstruct interstate commerce by extortion, and two counts of obstruction and attempted obstruction of interstate commerce by extortion. Petitioner waived trial by jury, March 18, 1982. The trial Judge found Petitioner guilty on all counts and on July 2, 1982 sentenced Petitioner to two years imprisonment, three years probation and $15,000.00 fine. Petitioner filed an appeal with United States District Court of Appeals for the Eleventh Circuit, October 25, 1982. On March 30, 1984 District Court of Appeals

reversed Count 5 (reducing fine to $10,000.00).

Count 1 of the indictment alleged Petitioner, in his official capacities as Senator of the State of Florida used the mail to defraud the citizens of their right to honest, loyal and faithful services. Petitioner served the sentence in full.

In November 1987, Petitioner filed Writ of Error Coram Nobis based upon the holdings of the United States Supreme Court's decision regarding McNally vs. United States. On June 15, 1990 the District Court entered an Order denying Petitioner's Writ of Error Coram Nobis due to Procedural Default and found further that "whether or not McNally addressed the issue is irrelevant". The United States Court of Appeals for the Eleventh Circuit, without opinion, affirmed the District Court's Order.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons:

In United States vs. Morgan 346 U.S. 502 74, S.Ct. 247, 98 L.Ed. 24S (1954) Justice Reed found:

"(5) The writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that effect the "validity and regularity" of the judgment, and was used in both civil and criminal cases."

Justice Read further concluded:

"(14) Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected."

In United States vs. Travers, 514 F2d 1171 (1974), the Court held that a motion in the nature of a writ of error coram nobis will lie under the all writs statute with respect to a federal felony conviction when

the sentence has been fully served and that defendant was convicted for an act that the law did not make criminal and further collateral relief was due. Justice Rehnquist further found:

"Travers' case is governed by United States vs. Morgan, 346 U.S. 502, 505 U.S. S. Ct. 247, 98 L Ed. (1954), which established that a motion in the nature of a writ of error coram nobis will lie under the All Writs statute, 28 U.S.C. 1651, with respects to a federal felony conviction when the sentence has been served in full."

In McNally vs. United States, 483 U.S. 350, S.Ct. 2875, 97 L.Ed. 2d. 292, (1987) the Court found the federal mail fraud statute (18 USCS 1341) is limited in scope to the protection of property rights, and does not refer to the intangible right of the citizenry to have public officials perform their duties honestly. Justice White concluded:

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"before on can be punished, it must be shown that his case is plainly with the statute. Fasulo vs. United States, 272 U.S. 620, 629, L.Ed. 443, 47 S.Ct. 200 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involved the Federal Government in setting standards of disclosure and good government for local and state officials, we read Section 1341 as limited in scope to the protection of property rights."

Justice White further stated:

"The Government concedes that if Petitioner's substantive mail fraud convictions are reversed their conspiracy convictions should also be reversed."

More recently in United States vs. Mandel, 672 F. Supp. 864 D.Md. (1987), the United States Supreme Court held: That Federal Fraud statute 18 USCA does not apply to non-property rights nor does it make punishable schemes to defraud citizens of

intangible right to honest and impartial state government. Convictions may be collaterally attached, by way of writ of error coram nobis, if non-constitutional change in law has been made since trial and appeal.

In Judge Smalkin's Memorandum VI (3):

"With the question of the propriety of seeing coram nobis relief based on a non-constitutional change in the law decided, the focus next becomes whether McNally is to be applied retro-actively to this case."

"There is persuasive authority to the effect that a Supreme Court decision construing the mail fraud statute as not reaching a particular scheme to defraud is fully retroactive."

Judge Smalkin further held "retroactive application of McNally, therefore is required." In VII (4), Judge Smalkin held:

"Given the recent, retroactive decision

in McNally vs. United States, together with the nonexistence of any federal common law of crimes, it is clear that intangible rights to good and honest government may not be the target of a criminal scheme to defraud under federal mail fraud statute, 18 USC 131."

The Court went on to hold that when a substantive count was vacated, the subsequent counts must also be vacated and quoted; United States v. Truglio, 731 F.2d 1123 (4th Cir.1984).

This Court should grant certiorari because of the disagreement in the various Court of Appeals regarding the application of McNally.

CONCLUSION

A writ of certiorari should issue to review the judgement and decision of the Court of Appeals in this matter.

DATED: MAY 19th., 1992

Respectfully submitted,

Dan I. Scarborough

DAN I. SCARBOROUGH, in pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

vs. Case No. 81-65-Cr-J-14
87-686-Civ-J-16
GEORGE L. ONETT, 87-952-Civ-J-16
DAN SCARBOROUGH

_____/

REPORT AND RECOMMENDATION

I. STATUS

Movant Onett and Petitioner Scarborough were convicted after a bench trial of multiple counts of mail fraud and Hobbs Act extortion. Onett was also convicted of two counts of grand jury perjury. Movant Onett has filed three separate Writs of Habeas Corpus pursuant to 28 U.S.C. § 2255, seeking to have his convictions vacated or set aside. Petitioner Scarborough seeks relief from his mail fraud conviction through a Writ of Error Coram Nobis, filed pursuant to 28 U.S.C. § 1651.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 10, 1986, Movant Onett filed his first Motion pursuant to § 2255, Case No. 86-593-Civ-J-16, alleging ineffective assistance of counsel as grounds for relief. On June 30, 1987, the motion to vacate, set aside, or correct sentence was denied.[1] On august 24, 1987, Onett filed a second Motion pursuant to § 2255, Case No. 87-686-Civ-J-16 alleging ineffective assistance of counsel and a denial of due process. Prior to any ruling, Petitioner filed a third Motion pursuant to § 2255, Case No. 87-952-Civ-J-16 attacking his mail fraud conviction under the recent Supreme Court decision of McNally v. United States, 107 S. Ct. 2875 (1987).

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[1] The Eleventh Circuit affirmed the denial on appeal. The records in this case were sent with that appeal and caused a delay in this Court's ruling on the Writs now before it.

The United States argued that Onett's second successive § 2255 motion should be dismissed as an abuse of the motion.

(1) Should Onett's second and third Motions be dismissed as an abuse?

Rule 9(b) of the Rules Governing Section 2255 Cases in United States District court provides:

> Successive motions. A second or successive motion may be dismissed if the Judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the Judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

This rules codifies the United States Supreme Court's holding in Sanders v. United States, 373 U.S. 1 (1963). The Sanders Court separated into two categories successive applications for habeas relief. The first category sets forth the principles governing successive motions which allege no new grounds for relief. The second category

includes both those successive applications that assert grounds different from those presented in a prior application, along with those that assert grounds presented earlier but not adjudicated on the merits. Id. at 15-19.

Under the first category, the district Court has discretion to dismiss the motion if "the ends of justice would not be served by considering the merits again in the subsequent (motion)." Bass v. Wainwright, 675 F.2d 1204, 1206 (11th Cir. 1982); Sanders, 373 U.S. at 15-19.[2] The movant

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[2]Although Bass analyses the abuse of a.§ 2254 Writ of Habeas Corpus, the principles developed in those cases also apply to § 2255 motions. See Sanders, 373 U.S. at 11-14; Gay v. United States, 816 F.2d 614, 616 n.1 (11th Cir. 1987); Bass, 675 F.2d at 1206 n.3.

bears the burden of establishing that a reconsideration would serve the ends of justice. Sanders, 373 U.S. at 15-19; Humphrey v. Unites States, 766 F.2d 1522, 1524 (11th Cir. 1985). Under the second category, the district Court must address a new ground unless the movant's failure to prosecute the ground earlier is shown to constitute an abuse of the motion remedy. Sanders, 373 U.S. at 15-19; Gay v. United States, 816 F.2d 614, 615 (11th Cir. 1987); Bass, 675 F.2d at 1206.

The government has the initial burden of alleging abuse of the motion, but once the allegation of abuse is raised, the burden is placed upon the movant to rebut the government's contention. Ritter v. Thigpen, 828 F.2d 662, 664 (11th Cir. 1987); Humphrey v. Unites States, 766 F.2d 1522, 1524 (11th Cir. 1985): Booker v. Wainwright, 764 F.2d 1371, 1376 (11th Cir.), cert.

denied, 474 U.S. 975 (1985); Witt v. Wainwright, 755 F.2d 1396 (11th Cir.), cert. denied, 470 U.S. 1039 (1985).

> The movant must prove by a preponderance of the evidence that he was ignorant of facts necessary to support the new ground when the prior motion was filed, or that he had not realized that those facts provided the basis for § 2255 relief. See Booker v. Wainwright, 764 F.2d 1371, 1376-77 (11th Cir.), cert. denied. [474] U.S. [975], 106 S. Ct. 339, 88 L.Ed.2d 324 (1985). If however, the movant intentionally withheld a claim from the previous petition, or was inexcusably neglectful, the motion may be dismissed. Haley v. Estelle, 632 F.2d 1273, 1375 (5th Cir. 1980) (citations ommitted).

Gay, 81 F.2d at 616, Ritter, supra; In re Shriner, 735 F.2d 1236 (11th Cir. 1984); Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), cert. denied, 46 U.S. 1213 (1984); Potts v. Zant, 638 F.2d 727 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981). The standard the Petitioner must meet to overcome the abuse of the writ allegation was also described in Jones v. Estelle, 722 F.2d 159, 163 (5th Cir. 1983), cert. denied, 466 U.S. 976 (1984), as follows:

According to Fay [v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963) relied on ny the Sanders Court], a petitioner loses the right to have a claim considered on a successive petition if her 'understandingly and knowingly forewent the privilege,' 372 U.S. at 439, 83 S. Ct. at 849, of raising that claim in his initial petition. The bar 'depends on the considered choice of the petitioner.' Id. But note that the inquiry is not whether the petitioner intended to give up his right to have a claim heard at all. It is whether he withheld it without legal excuse when he filed his earlier petition.

Even in capital cases, federal habeas corpus Courts in an effort to fulfill the mandate of Rule 9(b) to avoid needless piecemeal litigation have dismissed petitions on the basis of abuse of the writ. As stated by Justice Powell in Woodward v. Hutchins, 464 U.S. 377 (1984) (Powell, J., concurring in per curiam opinion):

A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward-often in a piecemeal fashion - only after the execution date is set or becomes imminent. Federal Courts

should not continue to tolerate - even in capital cases - this type of abuse of the writ of habeas corpus.

Onett's second and third § 2255 motions allege new and different grounds.[3] The United States has alleged an abuse in regards to the second successive § 2255 motion filed, case no. 87-686-J-16, shifting the burden on Onett to show by the preponderance of the evidence that his failure to raise these new and additional claims was not intentional or unexcusable neglect. The United States was silent as to the third successive motion regarding the McNally issue.

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[3] The first and second motion both alleged ineffective assistance of counsel. However, the claims are different in regards to the conduct of counsel asserted by movant to be inadequate.

Movant Onett filed a traverse responding to the United States allegation of abuse. Onett argues that the second successive motion was not an abuse because: (1) there had been no final prior determination of the initial motion, because an appeal was still pending before the Eleventh Circuit; and (2) when considering the first § 2255 motion, Onett was not granted a hearing, either on the facts or law and therefore the motion had not been determined on the merits.

Onett's traverse clearly fails to meet his burden and preclude this Court from finding an abuse in regards to the second successive § 2255 motion.

Second, Sanders, supra, does not require an evidentiary hearing when there are not material factual issues in dispute. 373 U.S. at 16-17; Townsend v. Sain, 372 U.S. 293 (1963); Porter v. Wainwright, 805 F.2d 930 (11th Cir.) cert. denied, 107 S.

Ct. 3196 (1986); Bass, 675 F.2d at 1207. Onett's initial ineffective assistance of counsel claims in his first § 2255 motion did not involve factual disputes and could be ruled on the record without the need of an evidentiary hearing.

Accordingly, Onett failed to meet his burden and provide this Court with any justification as to why his new allegations for relief stated within his second successive § 2255 motion should not be considered as an abuse of the motion, However, the Court shall consider Onett's third successive § 2255 motion as the United States did not allege an abuse. Ritter, 828 F.2d at 664; Humphrey, 766 F.2d at 1524.

Mail Fraud Charges

Movant Onett and Petitioner Scarborough were both convicted of one count of mail fraud under 18 u.S.C. § 1341. The underlying indictment alleged in Count I that Movant Onet, Petitioner Scarborough,

Harold Haimowitz, and Louis Ritter, engage in a conspiracy, using the United States Postal Services to mail matters or caused things to be mailed "for the purpose of executing a scheme and artifice to defraud and for obtaining property be means of false and fraudulent pretenses, representation, and promises..." Indictment, Count I, B.2., p.5; Findings of Fact, Conclusions of Law and Verdict, p.30. More specifically, the indictment and conviction was based upon a scheme and artifice to defraud the citizens of Florida, the Department of Business Regulations, the Division of Alcoholic Beverages and Tobacco, and officials and employees thereof, of their right to: (1) "honest, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of and by the defendant, Scarborough, in his official capacity as a Senator of the State of Florida"; (2) "have available and to be made aware of all

relevant and pertinent facts and circumstances and to have said officials and employees act on other than materially false and fraudulent information in administering the laws of the State of Florida"; and (3) "obtain and cause to be obtained, property, that is, a temporary and permanent alcoholic beverage license and transfer thereof to Abbott's Restaurants, Inc. from the Division of Alcoholic Beverages and Tobacco, by means of false and fraudulent pretenses, representations and promises and the knowing and intentional concealment of material facts." Findings of Fact, Conclusions of Law and Verdict, pp. 30-31; Indictment, Count I, B.2.a.,c., and d., pp.5-7. Movant Onett and Petitioner Scarborough argue that their mail fraud convictions should be vacated in light of McNally v. United States, supra.

(2) Procedural Default

This is the first time Onett and

Scarborough have attached their mail fraud conviction as lacking the necessary "property" element required by 18 U.S.C. § 1341.[4] An issue that could have been raised at trial or on direct appeal, will be procedurally barred from a § 2255 proceeding un less the movant satisfies the "cause and actual prejudice" test. United States v. Frady, 456 U.S. 152, 167-69 (1982); Wider v.

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[4]Section 1341 provides in part: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses representations, or promises... for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than $1,000 or imprisoned not more than 5 years, or both.

1985); Parks v. United States, 832 F.2d. 1244, 1245-46 (11th Cir. 1987).[5] Neither Movant Onett or Petitioner Scarborough has done so in this case.

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5 The underlying principles and standards of procedural default would also apply to Scarborough's Writ of Error Coram Nobis. See Moody v. United States, No. 88-8333, slip op. at 2829 (11th Cir. June 13, 1989); Ladd v. Jones, 864 F.2d 108 (11th Cir. 1989).

6 The United States asserted that Movant Onett waived his right to wage a collateral attack on whether or not the beverage license was "property" within the meaning of the mail fraud statute. Although the United States did not allege procedural default in regards to Petitioner Scarborough, it can be raised by the Court sua sponte. See Eagle v. Issac, 447.S. 107, 124-25 n.

26 (1982); Darden v. Wainwright, 725 F.2d 1526, 1550 n.48 (11th Cir.) (Tjoflat dissenting), cert. denied, 467 U.S. 1230 (1984).

Accordingly, the Movant Onett and Petitioner Scarborough have failed to show any cause to justify their procedural default and consequently their writs must be denied.

(3) Are the mail fraud convictions contrary to the holding in McNally v. United States, supra?

Even assuming arguendo that Movants are not in procedural default, their writs still must be denied. In McNally, supra, the Supreme Court examined the "any scheme or artifice to defraud" language contained in 18 U.S. C. § 1341, the mail fraud statute. (See footnote 4). The facts in McNally involved a scheme by James Gray, a former member of the Governor of Kentucky's

cabinet, Charles McNally, a private citizen, and Howard Hunt, former chairman of Kentucky's Democratic Committee, whereby Gray, McNally, and Hunt agree to purchase a workmen's compensation policy for the Commonwealth of Kentucky from Wombwell Insurance Company in return for a promise from Wombwell that they would pay a portion of its commissions to other insurance agencies owned and controlled by McNally, Hunt and Gray. Upon discovery of the self-dealing scheme, Gray and McNally were prosecuted and convicted on the theory that the scheme defrauded the citizens of Kentucky of their intangible right to honest government.

The Supreme Court reversed defendants' convictions concluding that the mail fraud statute protects only property rights and does not protect non-monetary intangible rights, such as "the intangible right of the citizenry to good government". 107 S. Ct.

at 2879, McNally did not involve an allegation of lost savings by Kentucky. The focal point of the jury instructions in McNally was honest government rather than tangible losses by the state. In explaining their decision, the Supreme Court stated that there was charge that the Commonwealth itself was defrauded of any money or property, nor was the jury charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium, secured better insurance or deprived of control over how its money was spent. Id. at 2882. This language seems to have suggested that the Court would not preclude convictions under the statute which concerned "intangible" property rights.

Such was the holding in Carpenter v. United states, 108 S. Ct. 316 (1987), where the Supreme Court specifically stated that while the mail fraud statute proscribed prosecutions under the intangible rights

theory, property protected by the statute could be either tangible or intangible in nature. In Carpenter, supra, the Supreme Court upheld the mail fraud conviction of a Wall Street Journal reporter on the theory that his acquisition of the Journal's confidential information deprived it of an intangible property right. The Court reasoned that the intangible nature of an interest "does not make it any less 'property' protected by the mail and wire fraud statutes". Carpenter, 108 S. Ct. at 320. "Carpenter stands for the narrow principle that McNally was not intended to exclude from the purview of section 1341 fraudulent schemes and artifices merely because the property interest involved was normally defined as an intangible one." United States v. Baldinger, 838 F.2d 176, 179 (6th Cir. 1988).

In the present case, although certain objects of the mail fraud conspiracy and

substantive counts are vitiated by the McNally decision, the indictment and written findings of fact made by the trial judge supporting the mail fraud conviction did allege a scheme to obtain property, i.e. the liquor license. Movant Onett and Petitioner Scarborough argue that neither the State of Florida or its citizenry were defrauded of anything, since a liquor license does not constitute "property" as held in Leafer v. State, 104 So.2d 350 (1958). In discussing the rights of the license holder, Leafer, supra, stated, "'a license is not property in a constitutional sense' and since 'it confer no right or estate or vested interest it would seem to follow that it is at all times revocable at the pleasure of the authority from which it emanates.'" 104 So. 2d at 351 (citing Miami v. Fuller, 187 So. 148, 150 (Fla. 1939). The Florida Supreme Court in Leafer failed to mention or distinguish its holding from Kline v. State

Beverage Department of Florida, 77 So.2d 872, 874 (Fla. 1955) which stated:

> Whether or not a liquor license is property, the cases are confusing and in conflict, but from the last cited cases it appears to be settled in this State that account of its peculiar character, the conditions that inhere in and actuate its issuance, a 'liquor license has come to have the quality of property, with an actual pecuniary value far in excess of the license fees exacted by the State, County or City.' See House v. Cotton, 52 So.2d 340, 341 (Fla. 1951); Holloway v. Schott, 64 So.2d 680 (Fla. 1953); Little Man's Club v. Schott, 60 So.2d 624 (Fla. 1952). See also Wooten v. Wooten, 160 So.2d 7446 (Fla. 2md DCA 1964) interpreted conflict in Florida Supreme Court precedent to mean that the liquor license is considered to be property in the commercial sense and not the constitutional sense).

Regardless, these Florida cases are directed at the issue of whether or not the license is property in the hands of the holder not the issuer. The issue before the Court is whether the State of Florida was defrauded of any property. Thus, this Court must make its own finding as to whether the State of Florida enjoyed any tangible or intangible property rights in the liquor license.

The liquor license is clearly distinguishable from the property right alleged in the mail fraud conviction in McNally, supra, i.e., the citizenry intangible right to good and honest government. In United States v. Berg, 710 F. Supp. 438 (E.D.N.Y. 1989), the District Court upheld a wire fraud conviction concluding that the export licenses obtained from the United States by fraud satisfied the property requirement.7 In concluding that a license was property under McNally,

supra, the District Court in Berg, supra, stated as follows:

> By contrast, the property at issue here is a license, the power to grant which remains solely with the United States, and the paper embodiment of which is in the possession of the Government until issued...
>
> Second, unlike the rights at issue in [United States v. Evans], [844 F.2d 36 (2d Cir. 1988)] licenses have been regarded as property in other contexts. As this Court noted in an earlier opinion, it is firmly established that licenses are property in the hands of the license holder. See Memorandum and Order at 9-10, No. 84 CR 190 (February 11, 1988); see also Bell v.

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7 In Carpenter, 484 U.S. at 19 n.6, the Supreme Court stated that since the language of the wire and mail fraud statutes is identical, a similar analysis applies to both.

Burson, 402 U.S. 535 (1971) (driver's license); Dixon v. Love, 441 U.S. 105 (1979) (same). 'Once licenses are issued...their continued possession may become essential in the pursuit of a livelihood.' Bell, 402 U.S. at 539. That observation is amply demonstrated by the facts of the present case. Had the arms export licenses been properly issued, defendants would have profited by thousands of dollars. The export licenses were certainly valuable property to the defendants.

To hold, as some Courts have, see United States v. Murphy, 836 F.2d 248 (6th Cir. 1988), that such valuable property vanishes when held in the hands of the issuer strikes the Court as preposterous. As our learned brother Glasser has recently noted, licenses and all other forms of government largess traditionally were considered property of the Government. The United States v. Turoff, 701 F. Supp. 981,

989-90 (E.D.N.Y. 1988) (citing Reich, The New Property, 73 Yale L.J. 733, 778 (1964). 'The salutary fact that, in modern times, Courts have recognized the property rights of licensees need not blind us to the equally compelling fact that licenses, like other forms of public largess, originate in the state and are 'public property' in the first instance.' 701 F. Supp. at 990.

This Court is of the same opinion as Berg, supra, concluding that the liquor license defrauded from the State of Florida was a property right, both tangible and intangible. For example, the State of Florida has a tangible property right in the paper issued embodying all the rights guaranteed by the liquor license. Although it may be a small amount expended by the State of Florida in producing the paper which embodies the rights of the liquor license, Florida still has expended monies and possesses property rights in that paper.

The State of Florida also possesses an intangible public property right in its discretion to control who possesses the liquor licenses. The liquor license and those rights connected thereto allow the holder to profit from it. The liquor license is valuable property in the hands of the licensee and prior to its issuance the State of Florida embraces an intangible public property right in its control and distribution.

Accordingly, the indictment and Findings of Fact and Conclusions of Law and Verdict, both stated a scheme to defraud the State of Florida of property to support the mail fraud convictions, and did not transgress the dictates of McNally and its progeny.

III. RECOMMENDATIONS[8]

The motions and petition be DENIED.

DONE AND ENTERED at Jacksonville, Florida, this ____ day of July, 1989.

/s/ HARVEY E. SCHLESINGER
United States Magistrate

Copies to:

The Honorable Susan H. Black
United States District Judge

George L. Onett
Route 1, Box 229-A
Reddick, Florida 32686

Dan Scarborough
404 West Monroe Street
Jacksonville, Florida 32202

United States Attorney (Fallgatter)

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[8] Any party may file and serve objections hereto within ten (10) days after service of this opinion. Failure to do so shall bar the party from a de novo determination by a District Judge of an issue covered herein and from attacking factual findings on appeal. See 28 U.S.C. §636; Thomas v. Arn, 106 S. Ct. 466 (1986); Nettles v. Wainwright, 677 F.2d 404 (en banc) (5th Cir. Unit B, 1982); and Local Rule 6.02.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICAN

vs. Case No. 81-65-Cr-J-14

DAN SCARBOROUGH

ORDER

This case is before the Court on petitioner Dan Scarborough's Petition for Writ of Error Coram Nobis, filed on August 14, 1987. The Petition was referred to the Magistrate to submit proposed findings of fact and recommendations pursuant to 28 U.S.C. § 636(b) (1) (B) and Rule 6.02, Local Riles of the United States District Court for the Middle District of Florida, on traverse in response to the government on February 4, 1988. The Magistrate heard oral argument on the pending motion on February 4, 1988.

The Magistrate filed a Report and Recommendation on July 7, 1989, recommending

that the petition be denied based on procedural default.[1] The Magistrate found that the defense that a liquor license is not property for the purpose of the Mail Fraud Statute was available to the petitioner at trial and should have been raise at trial.[2] Petitioner filed objections to the Report and Recommendation

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[1] This petition was assigned to the Court on March 26, 1990.

[2] After basing his recommendation on procedural default, the Magistrate reviewed the claim and recommended that the petition be denied on the merits, because the Indictment included a charge against petitioner of a scheme to defraud the State of Florida of tangible property, a liquor license, so as to support the conviction even after the Supreme Court decision in McNally v. United States, 107 S. Ct. 2875 (1987).

on July 21, 1989. Petitioner argues that Count One of his conviction should be vacated based on the Supreme Court decision in McNally v. United States, 107 S. Ct. 2875 (1987), that his Writ of Error Coram Nobis is timely filed because the writ was filed soon after the decision, and therefore, procedural default should not apply. Petitioner also contends that the Magistrate's finding that a liquor license is a tangible property right in Florida is incorrect. The Court will address petitioner's objections in turn.

I. INTRODUCTION

Petitioner Scarborough was convicted, inter alia, of one count of conspiracy to violate the Mail Fraud Statute, 18 U.S.C. § 1341, on May 14, 1982.[3] Scarborough was a

[3]The Judgment against petitioner Scarborough is as follows:

As to Count One, guilty of conspiring

to violate the Mail Fraud Statute, 18 U.S.C. § 1341.

As to Count Two, guilty of conspiring to extort, in violation of 18 U.S.C. § 1951.

As to Count Four, guilty of extortion, in violation of 18 U.S.C. §§ 1951 and 1952.

As to Count Five, guilty of obstruction and attempted obstruction, in violation of 18 U.S.C. § 1951.

State Senator and President Pro Tempore of the Florida Senate, an elected official of the State of Florida. In 1980, as a State Senator, Scarborough was a member of the Senate Ways and Means Committee, Sub-Committee A, which regulated the budget for the Department of Business Regulations. Count One of the Indictment charged that petitioner Scarborough, and codefendants George Onett, Harold Haimowitz, and Louis

Ritter, Sr., engaged in a conspiracy, using the United States Postal Services to mail matters, or caused things to be mailed, "for the purpose of executing a scheme and artifice to defraud and for obtaining property by means of false and fraudulent pretenses, representations, and promises." Indictment, Count One, at ¶ B.2. The Indictment charged the defendants with conspiring, inter alia:

> [t]o obtain and cause to be obtained, property, that is, a temporary and permanent alcoholic beverage license and transfer thereof to Abbott's Restaurants, Inc., doing business as Abbott's Steak House, from the Division of Alcoholic Beverages and Tobacco, Department of Business Regulations, State of Florida, by means of false and fraudulent pretenses, representations, and promises, and the knowing and intentional concealment of material facts relating among other things, to the disclosure and investigation of the existence and qualifications of the applicant for said liquor license and any person interested directly and indirectly with the applicant in Abbott's Restaurants, Inc., doing business as Abbott's Steak House, and any manager and person to be in charge thereof, in accordance with among other provisions, Florida Statutes, Section 561.17 and 561.18.

Id. at ¶ B.2.d. Additionally, the

Indictment charged Scarborough with conspiring to defraud the citizens of Florida, the Department of Business Regulations, the Division of Alcoholic Beverages and Tobacco, and officials and employees thereof, of their right to "honest, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of and by defendant, Dan Scarborough, in his official capacity as a Senator of the State of Florida, free from bribery and unlawful compensation, and in accordance with the statutes and laws of the State of Florida." Id. at ¶ B.2.a.

After a bench trial, the trial Court found petitioner guilty of Counts One, Two, Four, and Five, on May 14, 1982. Petitioner was sentenced on July 2, 1982, as follows: two years in prison on Counts One and Two, to run concurrently, and a $5,000.00 fine as to Count One only; three years probation on Counts Four and Five, to run concurrently,

and a $5,000.00 fine as to both Counts Four and Five. On May 8, 1984, the Eleventh Circuit Court of Appeals affirmed Scarborough's convictions as to Count One, Two, and Four, and reversed as to Count Five.

II. PETITION FOR WRIT OF ERROR CORAM NOBIS

Petitioner challenges his mail fraud conviction, asserting that a liquor license is not property and, therefore, the conviction lacked the requisite property element pursuant to 18 U.S.C. § 1341.[4]

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[4]The Mail Fraud Statute provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... for the purpose of executing such scheme or artifice or

attempting so to do, places in any post office or ...shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1984).

. Although he is raising this issue for the first time five years after his conviction, petitioner contends that procedural default should not be applied to this petition. Petitioner does not argue that he challenged at trial and on direct appeal, that prong of the Indictment which relied on the tangible rights theory that a liquor license is property under 18 U.S.C. § 1341. Instead, petitioner contends that, because he timely filed his petition soon after the McNally decision was handed down by the Supreme Court, the Court should address the merits of that petition. Although the government did not raise procedural default with respect to petitioner, the Magistrate

correctly raised the issue sua sponte. See Eagle v. Issac, 447 U.S. 107, 124-25 n.26 (1982); Darden v. Wainwright, 725 F.2d 1526, 1550 n. 48 (11th Cir.), cert. denied, 47 U.S. 1230 (1984).

In order for petitioner to obtain collateral review on a federal habeas petition based on trail errors to which no contemporaneous objections were made, the petitioner must show both cause for failure to raise the claim earlier and actual prejudice. United States v. Frady, 456 U.S. 152, 167 (1982); Boschen v. United States, 845 F.2d 921 (11th Cir. 1988); Parks v. United States, 832 F.2d 1244 (11th Cir. 1987). The petitioner must show both "1) cause excusing his double procedural default, and 2) 'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 167.

At the time of petitioner's trial and appeal, the defense that a liquor license

was not a property right was available to the petitioner, and thus should have been raised. See Leafer v. State of Florida, 104 So.2d 350 (1958).5 Failure of the petitioner to raise the defense at trial results in procedural default, unless the petitioner demonstrates cause and prejudice.

Petitioner does not demonstrate cause and prejudice for his failure to raise the tangible rights attack at trial, but rather argues that the Court should vacate his conviction based on McNally.6

Petitioner's reliance on McNally is misplaced. It is correct that the prong of petitioner's Indictment which relies on the conspiracy to defraud the citizens of the right to honest and faithful services of a state official is eliminated by McNally. However, petitioner's conviction also relies on a finding of a separate scheme to defraud property, the liquor license.7 Because the defense that a liquor license is not a

5 In Leafer, the Florida Supreme Court found that "this Court has repeatedly held that no such [property] right vested by virtue of a [liquor] license of this kind." Leafer, 104 So. 2d at 351 (citations omitted). The Court further stated that "we declared that no right to sell intoxicants vested in any person, but that the license to engage in the business was merely a privilege." Id.

6 The Supreme Court in McNally held that the federal Mail Fraud Statute is not implicated based on an intangible right of the citizenry to good government. McNally, 107 S. Ct. at 2879; accord United States v. Italiano, 837 F.2d 1480 (11th Cir. 1988). The Court narrowed the application of the Mail Fraud Statute to those schemes which deprive people of money or property. McNally, 107 S. Ct. at 2879.

In McNally, a Kentucky public official was indicted for participating in a kickback scheme, whereby the official used his political influence to direct governmental insurance business to insurance companies in which the defendant had financial interests. The Supreme Court found that the conviction did not rest on any deprivation of money or property, and reversed the conviction. Id. at 2882.

7 The Judgment against petitioner, filed on May 14, 1982, includes in Count One, reference to both violations of the Mail Fraud Statute. The Court held in the Conclusions and Verdict, inter alia, as to Count One:

The defendants, Haimowitz, Scarborough and Onett, from on or about November 1979 to on or about August 1980 did unlawfully, knowingly, willfully and intentionally conspire, combine,

confederate... to use and cause to be used the United States Postal Service by mailing and causing to be mailed matters and things, for the purpose of executing a scheme and artifice to defraud and for obtaining property by means of false and fraudulent pretenses and representations, in violation of Title 18 U.S.C. § 1341. The scheme and artifice was to defraud the citizens of the State of Florida and the Department of Business Regulations and the Division of Alcoholic Beverages and Tobacco, and the officials and employees thereof, of their right to the honest, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of and by the defendant, Scarborough, in his official capacity as a Senator of the State of Florida. The scheme was further to defraud the

citizens of the State of Florida and the Department of Business Regulations and the Division of Alcoholic Beverages and Tobacco, and the officials and employees thereof, of the right to have available and to be made aware of all relevant and pertinent facts and circumstances and to have said officials and employees act on other than materially false and fraudulent information in administering the laws of the State of Florida. The Court further concludes that the defendant[s] ....sought to obtain and caused to be obtained property, that is a temporary and permanent alcoholic beverage license and transfer thereof to Abbott's Restaurants, Inc. from the Division of Alcoholic Beverages and Tobacco, by means of false and fraudulent pretenses, representations and promises and the knowing and

intentional concealment of material facts.

Finding of Fact, Conclusions of Law and Verdict, filed on May 14, 1981, at 30-31 (emphasis added).

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property right was available to the petitioner at the time of his trial, whether or not McNally addressed the issue is irrelevant. Petitioner's failure to raise the defense must result in a finding of procedural default.

The Court finds that petitioner has not demonstrated a legally sufficient cause for his failure to raise at trial and on direct appeal, the issue of whether or not a liquor license is property for Mail Fraud Statute purposes. The Court will deny petitioner Dan Scarborough's Petition for Writ of Error Coram Nobis, filed on August 14, 1987, based on procedural default. Because the Court finds procedural default, the Court will not

reach the merits of the petition.

Accordingly, it is

ORDERED:

1. That petitioner's objections to the Magistrate's Report and Recommendation are hereby overruled.

2. That petitioner Dan Scarborough's Petition for Writ of Error Coram Nobis, filed on August 14, 1987, is hereby denied.

3. That the Clerk of the Court shall enter Judgement dismissing this action.

DONE AND ORDERDED at Jacksonville, Florida this 15th day of June, 1990.

/s/ Susan H. Black
UNITED STATES DISTRICT JUDGE

Copies to:

Dan Scarborough
105 Riverside, Suite 300
Jacksonville, FL 32204

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-3613
Non-Argument Calendar

D.C. Docket No. 81-65-CR-J-14

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAN SCARBOROUGH,

Defendant-Apellant.

Appeal from the United States District Court
for the Middle District of Florida

(September 16, 1991)

Before FAY, HATCHETT, and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

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AFFIRMED. See Circuit Rule 36-1.

Judgment Entered: September 16, 1991
For the Court: Miquel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: FEB 4 1992

THE UNITED STATES COURT OF APPEALS

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 16, 1991, 11th Cir., 1991, _____F.2d_____).

Before: FAY, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5 the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE